Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SAMUEL A. ARONSON
Petitioner,

v.

JESSE BROWN, Secretary for Veterans Affairs;
THE DEPARTMENT OF VETERANS AFFAIRS;
THE UNITED STATES OF AMERICA, and
JANET RENO, Attorney General of the
UNITED STATES,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does 28 U.S.C. §455(a), which provides that "ANY JUDGE . . . SHALL DISQUALIFY HIMSELF IN ANY PROCEEDING IN WHICH HIS IMPARTIALITY MAY REASONABLE BE QUESTIONED," require that prima facie extra-judicial bias such as of record concerning Judge Ivers, mandated his RECUSAL pursuant to the literal mandate ON REMAND from the Court of Appeals for the Federal Circuit or, in the alternative, that the Appealate Court thereafter should have reached the merits of Judge Ivers' disqualification because of his then continuing refusal to recuse himself thereby continuing to abuse his discretion; and did the United States Court of Appeals for the Federal Circuit err by not reaching the recusal merits in light of the mandate of the recusal statute?

2. Whether the United States Court of Appeals for the Federal Circuit erred by upholding the Court of Veterans Appeals having upheld the Veterans Administration's (VA) erroneously advanced basis mandating recusal as being because:

    1. "The fact that Judge Ivers was once VA General Counsel **alone**" (Aronson v. Brown 7 Vet.App. 153, 157 (1994)

    2. "Judge Ivers (as former VA General Counsel) Congressionally articulated opposition to judicial review of VA decisions

(Aronson v. Brown 7 Vet.App. 153, 157 (1994)

Rather than the true basis of record asserted by Petitioner in his July 21, 1992 recusal motion wherein he articulated his discovery that during 1988, former VA General Counsel Ivers when testifying before the Congress, specifically termed service connected disability compensation such as for the loss of the Petitioner's left eye while in the Army, as being "***GRATUITOUS*** benefits", thereby revealing a "bent of mind" on the basis of which Petitioner reasonably questioned Ivers IMPARTIALITY pursuant to federal recusal statute.

3. Whether the United States Court of Appeals for the Federal Circuit erred by upholding the United States Court of Veterans Appeals (CVA) failure to comply with the explicit REMAND instructions from the United States Court of Appeals for the Federal Circuit, to REVIEW JUDGE IVERS' RECUSAL DECISION, and whether that failure violated Petitioner's right to Due Process of Law as guaranteed by the 5th Amendment to the United States Constitution by validating the nonrecusal action by Judge Ivers, who is not free from the APPEARANCE of bias, and whose IMPARTIALITY the Petitioner reasonably questioned?

4. Whether the United States Court of Appeals for the Federal Circuit erred by upholding the United States Court of Veterans Appeals conclusion that the issue of recusal "is now moot" and was moot at the time of the earlier

CVA decision, and whether that action was a facial attempt by the VA to avoid the clear mandate of the recusal statute, in order to protect its former General Counsel?

5. Whether the United States Court of Appeals for the Federal Circuit erred by upholding the actions of both the United States Court of Veterans Appeals and the Veterans Administration, by continuing to process this veteran's non-recusal appeal issues - and - underlying VA claim - and - extrordinary remedies under the All Writs Act, etc. , notwithstanding this veterans continuous motions/requests/demands at all times material that, in the case of CVA that it hold in abeyance all non-recusal appeal issues pending final resolution of the continuing recusal issue and, in the case of the VA, that all non-recusal claim issues similarly be held in abeyance pending final resolution of the continuing recusal issue/achievement of an IMPARTIAL/level playing field.

6. Whether the United States Court of Veterans Appeals erred by failing to take Judicial Notice of Petitioner's claim that the VA "Due Process" regulation 38 C.F.R. 3.103(a) which provides, in part:

> (a) *Statement of policy.* Proceedings before the Department of Veterans Affairs are ex parte in nature. **It is the obligation of the Department of Veterans Affairs to assist a claimant in developing the facts pertinent**

> to his or her claim and to render a decision which grants him or her every benefit that can be supported in law ***while protecting the interests of the Government***. This principle . . . apply[s] to all claims for benefits and relief and decisions thereon within the purview of this part." *{emphasis added}*

is UNCONSTITUTIONAL (both as being unconstitutionally vague as well as in violation of Due Process of Law), and is, in fact, the VA regulation which herein attempts to eclipse/negate the mandate of the recusal statute as well as Petitioner's right to Due Process of Law?

7. Whether the United States Court of Appeals for the Federal Circuit erred by failing to rule on Petitioner's August 29, 1995 extraordinary "MOTION TO SUPPLEMENT THE APPELLATE RECORD", pursuant to Federal Rule of Appellate Procedure 10(e)?

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OPINION BELOW

This Petition for Certiorari arises from the judgment of the United States Court of Appeals for the Federal Circuit dated August 17, 1995, which affirmed the decision ON REMAND of the United States Court of Veterans Appeals dated November 16, 1994.

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals for the Federal Circuit, by Writ of Certiorari pursuant to:

1. United States Constitution, Article 5 "Due Process of Law"
2. Federal Question: 28 U.S.C. § 1331
3. Federal Recusal Statute: 28 U.S.C. 455

CONSTITUTIONAL PROVISIONS INVOLVED:

Fifth Amendment:

"No person shall be held to answer for a capital, or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

FEDERAL STATUTE INVOLVED:

Title 28 U.S.C. §455(a) RECUSAL statute provides:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

FEDERAL REGULATION INVOLVED:

Title 38 C.F.R. §3.103(a) Veterans Administration "Due Process" regulation provides:

(a) *Statement of policy*. Proceedings before the Department of Veterans Affairs are ex parte in nature. It is the ***obligation*** of the Department of Veterans Affairs **to *assist*** a claimant in developing the facts pertinent to his or her claim and to render a decision which grants him or her every benefit that can be supported in law **while protecting the interests of the Government**. This principle ... apply[s] to all claims for benefits and relief and decisions thereon within the purview of this part." *(emphasis added)*

STATEMENT OF THE CASE

Samuel Aronson ("veteran" herein) was drafted into the Army of the United States during 1950 on a "limited duty" status, because of a pre-existing left eye condition, erroneously asserted by the Veterans Administration as being "traumatic blindness", but which was, in fact, a disabling condition wherein the veteran had diminished visual acuity i.e. could count how many fingers on a hand were held up. Under the then existing military Physical Profile Serial System known as "PULHES" (which defined the relationship between physical capacity and specific military duties to be performed), the veteran's "PULHES" profile was as follows:

Body Part / Function	Aronson Rating
"P": (physical capacity or stamina)	1
"U": (upper extremities)	1
"L": (lower extremities)	1
"H": (hearing)	1
"E": (eyes)	*3*
"S": (neuropsychiatric)	1

The numerical "RATING" assigned for each of the 6 body parts/functions, ranged between 1 to 4, and recognized a "1" as meaning able to perform maximum sustained effort/meets general service standards, etc., ranging downward to a "4" which meant below minimum standards for induction, etc.

The "3" assigned the veteran's eye herein, meant the following according to the PULHES profile:

> "Below 1 but meets **minimum** standards for induction under MR 1-9."

The veteran's "physical profile" upon his October 24, 1950 induction examination, ***disqualified him for "general service"*** as required under "physical category" "A" and "B" ["A": "Fit for duty in combat zones and for any strenuous work, and "B": Fit for close combat support duties], as the veteran herein was placed in category "*C*", which qualified him for "limited service" as follows:

> "Fit for duty in lines of communications, or bases overseas, or in the continental United States."

Significantly, it was thereby determined that the veteran herein was **NOT** fit for duty in combat zones, nor was he fit for close combat support duty.

Notwithstanding his assigned "limited service" duty status/basis of induction, he was soon thereafter assigned to the **regular *combat* course phase of infantry training**, wherein he was required to participate in a ***night*** live fire machine gun obstacle training course. At a low crawl to avoid bullets, he inadvertently tripped a small snow covered wire which detonated a powder blast/simulated explosion in close proximity to him, which propelled sand, gravel, dirt, snow, etc., into his face and **left eye**. The sergeant in charge saw blood on his cheek and told him to wipe it off and not be a "pansy", and he was not allowed to go to the dispensary, because recruit Aronson was only one of a few who qualified as sharpshooter on the rifle range, and the sergeant did not want to jeopardize platoon honor points. To this day, in light of his assigned "limited duty" Army status and known pre-existing eye condition, the veteran is at a loss to understand why the Army in the

first instance, would require that he participate in a night live fire machine gun obstacle course, when his eye condition precluded his ever being in or near combat zones.

Following basic training, his eye was checked by a doctor at Madigan Army Hospital in Washington, checked his eye, who indicated that "nothing was wrong with it", but told him to bathe it in boric acid.

After basic and infantry training, the veteran was transferred to Germany, and while participating in a 25-mile training march, the same eye was once again irritated by dust thrown up by tanks. The irritation and pain which resulted was treated by the U.S. Army 97th General Hospital in Frankfurt for an examination, which led to a dispute between army doctor Colonel A.J. Vadala who wanted to remove the eye, and a German ophthalmologist Rose Sabbota (working for the Army), who proposed a surgical procedure to repair his eye. The veteran was assured that Dr. Sobbota would perform the repair surgical procedure, and that his partially functioning left eye would **not** be removed.

On August 31, 1951, the veteran awoke after surgery to find that his pre-surgery partially functioning left eye, in which he had substantially better vision than the government's alleged "light perception only", was gone.

During April 1953, he was released from the Army and thereafter filed an initial claim for service-connected disability, with the Veterans Administration ("VA" herein) by reason of the fact that he had entered the Army with 2 functioning eyes, and was released with only 1.

Notwithstanding the dispositive evidence of record concerning the removal of his eye in an Army hospital, the VA denied the veterans claim on March 23, 1954.

During March 1987, the veteran reopened his VA claim asserting that the March 23, 1954, rating decision contained clear and unmistakable error. A

deferred or confirmed rating decision, dated November 28, 1988, continued to deny service connection and denied that there was any clear and unmistakable error in the prior rating decision, and his claim was denied by the Board of Veterans Appeals (BVA) on September 7, 1990.

The veteran timely appealed to the Court of Veterans Appeals (CVA) resulting in an ORDER {see: Appendix at page 23} dated February 13, 1992 wherein Judge Ivers specifically noted, in part, the following at page 2:

> "The major problem with the BVA decision is not the failure to discount the evidence in support of appellant's claim but **the failure to recognize that there is no evidence of record against the claim**." . . Instead of a confession of error, the Secretary seeks only remand {Order at 2}
>
> and accordingly, Judge ORDERED that the September 7, 1990, BVA decision be reversed and the matter remanded to amend the 1954 rating decision to award service connection and determine the appropriate disability rating for appellant, taking into account the change brought about by the enucleation of my left eye. In accordance with 38 C.F.R. § 3.105(a), "for the purpose of authorizing benefits," **the corrected rating decision must be given the same effect as if rendered March 23, 1954**."

In response, the VA Regional Office in Seattle Washington ("VARO" herein), by letter dated May 15, 1992, determined that the veteran had been 30% disabled upon induction into the Army, thereby ignoring the evidence concerning his been compelled to participate in the normal course of combat infantry training to which he had indisputably been assigned by the Army, notwithstanding the "limited service" (non-combat or even combat support) mandated by

my "Physical Category 'C'" profile. Accordingly, the applicable 40% service-connected disability rating was erroneously reduced by the above cited 30%, **resulting in a 10% disability for the loss of my left eye**. The VARO decision was absolutely consistent with the 38 year pattern of VA lawlessness (unconstitutional practices and procedures as violative of Due Process of Law) which had by then already blatantly victimized me for almost 4 decades.

During this period of time, May - June, 1992, several significant events transpired which directly gave rise to this Petition, as noted in the following excerpt from veteran's February 11, 1995 Brief and Appendix ON REMAND from the Court of Appeals for the Federal Circuit ("CAFC" herein) (see: APPENDIX item #5, at page A-28 for entire excerpt):

> "At approximately that point in time, May 1992, two profoundly significant events transpired, which I assert to be absolutely relevant to this recusal appeal, as follows:
>
> 1. I learned that CVA Judge Ivers who was actively involved in my CVA case, had formerly been the General Counsel of the Veterans Administration, which in and of itself I did not perceive as being significant. However, I also learned that as VA General Counsel, Ivers had appeared during 1988 before a U.S. Senate, concerning the issue of subjecting the VA to Judicial Review, and specifically indicated the following:
>
> . . . . .
>
> **"Generally speaking, veterans have a special advantage over claimants for other types of *GRATUITOUS* benefits."**
>
> [*(emphasis added* -- see: Senate Hearing book: 100-938, April 28, 1988,

concerning VA Judicial Review Legislation, at page 493]

I also indicated in my February 11, 1995 Brief:

> It is clear to this veteran, that former General Counsel Ivers having classified veterans benefits as being "**gratuitous**" --- **GIFTS** --- continues to be his perception, is a **BIAS** on his part, is **prejudicial** to my case and, at least in part, explains his arbitrary and capricious July 7, 1992 order. Neither Title 38 United States Code nor the United States Congress, share/shared Judge Ivers classification of veterans benefits as being "gratuitous". I assert that the disability compensation benefits which compensate me for the loss of my eye as a direct result of my honorable military service, are **NOT** "gratuitous".
>
> Accordingly, I formally and strenuously object to now Associate Judge Ivers continuing to be involved in my case before the Court of Veterans Appeals, in any manner -- to include the requested panel or en banc de novo review. Accordingly, I hereby demand that this Court recuse Judge Ivers from any additional involvement in my case, or, in the alternative, that Judge Ivers recuse himself for the reasons cited herein. . . "

2. I learned that the Seattle VARO had erroneously applied the controlling VA regulation 38 C.F.R. § 4.22 (see: APPENDIX item #6 for complete quote) concerning the proper determination of service-connected disability for the removal of my eye while in the Army.

Accordingly, no deduction should have been made by the VARO, by reason of the fact that the "degree of disability at the time of entrance into the service" was

not ascertainable from the record, but is clearly revealed from the actions which the Army took i.e. requiring the veteran to participate in the regular course of advanced infantry/combat training --- in the face of the assigned "limited duty"/non-combat duty status. The definitive question which the VA, CVA, etc., continuously ignored, was and is:

> "Would Mr. Sam Aronson have been on a night machine gun course, if he had been blind and/or had "light perception only, in one eye?"

The answer is NO. Prima Facie evidence.

Accordingly, in order to compel the VA to meaningfully comply with the February 1992 CVA REMAND and the recognition of 38 years of "Clear and Unmistakable Error", on April 30, 1992, it was a totally frustrated veteran who filed a Petition for Writ of Mandamus pursuant to the All Writs Act { 28 U.S.C. § 1651 (1988)} with CVA wherein he demanded, among other things, that the VA be immediately ordered to provide an eye examination both the treat his left eye socket as well as to evaluate his remaining eye. On May 19, 1992, Judge Ivers issued an order directing the agency to explain why it had not yet provided the veteran with the eye examination required by his February decision. The VA later contended that Judge Ivers' February ORDER had not expressly directed the agency to conduct an eye examination on remand.

From May 11, 1992 through June 9, 1992, the veteran filed 3 separate addenda to his Writ of Mandamus requesting additional relief concerning the VA's mishandling of his case, believing that he had every right to fully pursue all extraordinary remedies which he believed applicable to the situation.

On July 7, 1992, Judge Ivers denied the veteran's Petition for a Writ of Mandamus, holding that the veteran had failed to meet the threshold requirement

for relief under the All Writs Act, but Judge Ivers also held that the VA had erred in assigning the veteran a disability rating without first providing him an eye examination. Judge Ivers therefore Ordered the VA to provide the examination, and explained that if Mr. Aronson was dissatisfied with the rating assigned following the eye examination, he should initiate a new appeal with the BVA.

By Motion dated July 21, 1992, I moved CVA for a CVA panel review of Judge Ivers denial of his Petition for Writ of Mandamus. Additionally, in that same Motion, because the veteran had then learned as noted above, that Judge Ivers was on record when testifying before the United States Congress during 1988 as VA General Counsel, as defining veterans service-connected disability compensation benefits as being "GRATUITOUS". Accordingly, reasonably believing that a negative bent of mind was thereby revealed, and determined after 4 decades to finally have a completely level playing field/impartial Judge, I reasonably questioned Judge Ivers IMPARTIALITY and, accordingly, moved CVA to recuse him from any additional involvement in my case, or, in the alternative, that Judge Ivers recuse himself for the reasons cited herein

By order dated August 14, 1992, Judge Ivers denied the veterans RECUSAL motion, and on August 20, 1992, the veteran filed a motion seeking panel, or alternatively, en banc review of Judge Ivers' denial of the recusal motion, wherein I specifically demanded the following:

> "I now file this preliminary motion for review of the recusal denial, in order to delay the panel review of my July 21, 1992 appeal, until such a time as the "recusal" question is finally decided."

in order to stop both the VA and CVA process, until such a time as the recusal issue was final, and to

ensure that Judge Ivers was no longer involved in any aspect of the then pending extraordinary remedies then pending before CVA.

On September 2, 1992, notwithstanding the veteran's demand that the appeal be held in abeyance pending final disposition of the Ivers recusal issue, a per curiam decision by a CVA panel consisting of Associate Judges Mankin, **Ivers,** and Steinberg, denied the veteran's motion for review of the denial of his petition for a Writ of Mandamus.

By Order dated October 23, 1992, the CVA referred the veteran's request for review of Judge Ivers' RECUSAL decision to a three-judge panel.

On November 20, 1992 the veteran filed a Motion for injunction or stay pending appeal pursuant to Rule 8 of the Court of Veterans Appeals.

By ORDER dated December 11, 1992, Judge Ivers Ordered the Acting VA Secretary within 15 days to respond to the veteran's contentions, and specifically noted the following in his Order:

> "Appellant claims to have informed the RO *{VA Regional Office in Seattle}*. that the Court still has jurisdiction over his claim since it is still pending before the Court on a recusal issue. . . This issue *{recusal}* is still pending before the Court. Thus, the Court still has jurisdiction over this case."

On January 25, 1993, a CVA panel composed of Chief Judge Nebeker, and Associate Judges Mankin and Steinberg, erroneously dismissed the veteran's request for review of Judge Ivers' recusal decision as "beyond the purview of this Court's review authority." The CVA also denied the veteran's petition for en banc review of Judge Ivers' recusal decision.

On February 19, 1993, the veteran, believing all other issues to be held in abeyance pending the final disposition of the RECUSAL issue, appealed the CVA's January 25, 1993 panel decision dismissing his

motion for review of Judge Ivers' recusal petition, to the Court of Appeals for the Federal Circuit (CAFC).

On January 5, 1994, CAFC Circuit Judges NEWMAN and PLAGER, and RONEY, Senior Circuit Judge, ruled [see: Aronson v. Brown, 14 F.3d 1578 (Fed.Cir. 1994)], holding that CVA erred in its holding that 28 U.S.C. § 455 does not grant the court authority to review the challenge to Judge Ivers' qualification, and accordingly, vacated and remanded the case back to CVA. CAFC also concluded:

> " . . . we do not reach the merits of Judge Ivers' disqualification, or decide whether the reviewing statute authorizes further review by this court upon decision of the CVA." (at 1579) . . We first determine whether it is within this court's authority to review any of these issues. . . Mr. Aronson points out that the issue of an unbiased judiciary is of constitutional dimension."

and thereafter CAFC also noted the profoundly serious nature of a recusal matter as at issue herein, as follows:

> "The powerful national interest in an impartial judiciary is reflected in this amendment of {28 U.S.C.} § 455, for removal of the subjective standard shifts emphasis to the appearance as well as the fact of impartiality. In *Liljeberg*, 486 U.S. at 860, 108 S.Ct. at 2203, the Court stressed the importance of avoiding all appearance of impropriety, in promoting "public confidence in the integrity of the judicial process. *See Aetna Life Ins. Co. V. Lavoie*, 475 U.S. 813, 825, 106 S.Ct. 1580, 1587, 89 L.Ed.2d 823 (1986) ("justice must satisfy the appearance of justice") (quoting *In re Murchison*, 349 U.S. 133, 136. 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955)). . . The Court of Veterans Appeals is not barred, by statute or by precedent,

> from conducting its own review of a charge under § 455 against one of its judges. In addition, litigants before the Court of Veterans Appeals have the right to further review by that court of a decision by a judge sitting alone. . . However, when a judge's qualification has been challenged, the Court of Veterans Appeals has not only the authority but also the responsibility to undertake such review."

On REMAND before CVA, NEBEKER, Chief Judge, and MANKIN and STEINBERG, Judges, erroneously held on November 16, 1994 {see: Appendix at page 4} that:

> "(1) controversy regarding recusal was mooted by VA's action satisfying court's order, and
>
> (2) assuming controversy not moot, judge's statement provided no basis for recusal."

directly giving rise to this Petition for Writ of Certiorari, and on November 29, 1994, the veteran filed a NOTICE OF APPEAL, thereafter filing his "BRIEF AND APPENDIX" ON REMAND from CVA on February 11, 1995.

By JUDGMENT {see: Appendix at page 3} dated August 17, 1995 CAFC AFFIRMED, and veteran thereafter on August 29, 1995, filed my Petition for Rehearing Combined with Suggestion for Rehearing In Banc.

On September 26, 1995, CAFC ORDERED {see: Appendix at page 1} the following:

> "ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further
>
> ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED."

ARGUMENT/REASONS FOR GRANTING WRIT:

The decision by CAFC in ARONSON v. BROWN [7 Vet.App. 153 (1994)], is at odds with 28 U.S.C. §455(a)'s legislative history, the reasoned opinions of all commentators to consider the issue, and risks injustice in a wide array of future judicial recusal cases. The Recusal statute requires disqualification in any proceeding in which the judge's impartiality "might reasonably be questioned." In the Ninth Circuit, Petitioner's Circuit, the test for disqualification under this subsection is:

> "Whether or not given all the facts of the case there are reasonable grounds for finding that the judge could not try the case fairly either because of the appearance or the fact of bias or prejudice. United States v. Conforte, 624 F.2d 869, 881 (9th Cir.), cert. denied, 449 U.S. 1012 (1980),"

As indicated below, Judicial Impartiality is a major goal of the American legal system, as well as an essential element of the system of justice in America, and the right to a "neutral and detached judge" in all proceedings is protected by the United States Constitution. A neutral and detached judge is also essential to the provision of a fair hearing, and this Court has consistently held that due process requires as much. See: Ward v. Village of Monroeville, 409 U.S. 57 (1972), Mayberry v. Pennsylvania, 400 U.S. 455 (1971), In re Murchison, 349 U.S. 133 (1955), Tumey v. Ohio, 273 U.S. 510 (1927).

Justice Frankfurter observed that courts possess "neither the purse nor the sword", {Baker v. Carr, 369 U.S. 186, 267 (1962)(Frankfurter, J., dissenting)}; their authority rests ultimately on public acceptability of judicial decision making. That acceptability depends in turn on a belief in the impersonality and reasoned foundation of judicial decisions. Such a belief is, of course, undermined when judicial

decisions may be closely identified with the interests or ***prejudices*** of the decision makers themselves. See: McKay, The Judiciary and Nonjudicial Activities, 35 Law & Contemp. Prob. 9, 11 (1970).

We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices. See: In re J.P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943).

The authority of the judiciary is dependent on public confidence in the impersonality and reasoned foundation of judicial decisions, and it is essential that judges be disqualified whenever the public may reasonably question their impartiality.

In that regard, this Court has said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." Tumey v. State of Ohio, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "**justice must satisfy the appearance of justice.**"

(see: Offutt v. United States, 348 U.S. 11, 14)

An impartial judiciary is also essential to maintain public confidence in the integrity of the judicial system (see: Judicial Disqualification: Hearing on S. 1064 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93rd Cong., 1st Sess. 1, 75 (1971 and 1973)(statement of Senator Burdick)(disqualification ensures that judicial decision is not tainted with partiality and thus "enhances public confidence in the judicial system").

The Petitioner asserts that the use of the word "might" in 28 U.S.C. § 455(a), was intended to indicate that disqualification should follow if the "reasonable man", were he to know "all the circumstances", would harbor doubts about the judge's impartiality. Judges are required to recuse themselves if they perceive any grounds for disqualification, and when reasonable grounds for disqualification exist disqualification is mandatory.

The APPEARANCE of impartiality throughout the judiciary is the goal, and 28 U.S.C. § 455(a) seeks to guarantee not only that a biased judge will not participate but also that no reasonable person will suspect as much. When there are in fact reasonable grounds to question a judge's impartiality, the rights of any segment of the population affected by the decision may appear to have been subject to the biases of one individual.

A judge "should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." See: B. Cardozo, The Nature of the Judicial Process 112 (1921), and this Petitioner asserts that Judge Ivers failed in that regard by ignoring the obvious fact that his impartiality might reasonably be questioned, and by refusing to recuse himself. Judge Ivers thereby abused discretion.

Additionally, going to the question of Judge Donald Ivers abuse of discretion in failing to recuse himself from my case, and aside from disqualification for actual and legal bias, as indicated above, a judge is also disqualified when his impartiality might reasonably be questioned. 28 U.S.C. §455(a). The test is an objective one: whether a disinterested, lay observer, fully informed of the facts underlying the grounds on which disqualification is sought, would entertain a significant doubt about the judge's impartiality. see: In re Drexel Burnham Lambert Inc, 861 F2d 1307, 1313 (2d Cir. 1988). Any such disinterested, lay observer who was fully informed as to the fact of VA General Counsel Ivers perception of service-connected disability (such as for the loss of an eye as in my case) as being a GRATUITY (gift), would doubt Judge Ivers IMPARTIALITY as concerns his present CVA decisions concerning those same type of "benefits".

"The Due Process Clause 'may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" See: Aetna Life Ins. Co. v. Lavoie, 106 S. Ct. 1580, 1587 (1986).

As a case in point, a Judge who had been U.S. Attorney for the district when the defendant was indicted was disqualified under 28 U.S.C. § 455 although his contact with the prosecution had been strictly formal. See: United States v. Amerine, 411 F.2d 1130 (6th Cir. 1969).

Going to the question of the GRATUITY statement which Judge Ivers made and actions which he took while general counsel for the respondent, this appellant asserts that bias against a class is likely to manifest itself as bias against members of that class, for example, a Judge was disqualified to preside at the trial of persons of German ancestry who had said:

> **"If anybody has said anything worse about the Germans than I have, I would like to know it so I can use it! One must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty."** Berger v. U.S., 255 U.S. 22, 65 (1921).

Significantly, in the recent disqualification of federal District Judge H. Lee Sarokin from presiding over tobacco liability litigation, the 3rd Circuit Court of Appeals acknowledged that Judge Sarokin was not biased or prejudiced against the defendants, but that he had demonstrated a disqualifying "***APPEARANCE*** OF BIAS". See: Haines v. Liggett Group Inc., 1992 WL 212498.

In addition to having asserted a basis on which this appellant reasonably questioned Judge Ivers impartiality, the Petitioner has also asserted that Judge Ivers statements and actions while general counsel for the VA, give fair support to my belief that he has a BENT OF MIND that may prevent or impede his impartiality of judgment. See: Berger v. United States, 255 U.S. 22,33-34 (1921).

This Petitioner asserts that there exists ample evidence in the record below of Judge Ivers previous position as former VA General Counsel, that any reasonable objective observer would question his impartiality. Accordingly, his failure to comply with the recusal mandate of 28 U.S.C. § 455(a) was a "plain violation of the terms of the statute." See: Liljeberg v. Health Services Acquisition Corp, 108 S. Ct. 2194, 2203 (1988).

Going to the question of the significance of Judge Ivers statements and actions while VA General Counsel, Petitioner noted the following:

> "Yet while statements or activities suggesting bias against a particular party would, almost

> regardless of their strength or content, require disqualification in a case involving that party, statements or conduct directed against a class of persons *(veterans)* would not always raise reasonable doubts about a judge's impartiality. . . The critical question is whether the statements or activities would suggest to the reasonable man that the judge's bias against a class would give rise to a personal bias against a party in court who is a member of that class."
>
> (see: Disqualification of Judges and Justices in the Federal Courts, 86 Harvard Law Review 736, 756 (1973).

In that regard, Petitioner asserts that Judge Ivers statements and activities while VA General Counsel for the respondent evidences to this appellant, and any reasonable citizen, a bent of mind which continues to this day, and serves as a case in point concerning the following observation:

> "Yet when a member of one of the political branches has advocated a position with regard to the Government's right in a given instance to exercise a particular power, and when he then participates in the ultimate ruling on the propriety of that exercise of power, a special threat is posed to public confidence in the judiciary. Reasonable men may then question not only the impartiality of judges but also the independence of courts from the political branches and the ability of the judiciary to perform its role of protecting against abuses of power by those branches. Cf. Editorial, N.Y. Times, Oct. 12, 1972, at 46, col. 1 (see: Disqualification of Judges and Justices in the Federal Courts, 86 Harvard Law Review 736, 764 (1973).

Going to that point, when Judge Ivers VA General Counsel, he was not engaged in merely writing about the Government's powers. He was actively engaged in upholding the Government's powers and in challenging the right of certain groups and individuals to take issue with those powers. As former VA General Counsel for the defendant even when Petitioner's VA case was in progress, Judge Ivers was also required to argue, on the one hand, that the VA did not view itself as a prospective litigant with the veteran but, on the other hand, he enforced government policies by filing suit against approximately 200,000 veterans during the 1980's, for alleged benefit overpayments that averaged $570.

In a July 1, 1986 letter to the Editor of the Washington Post newspaper from U.S. Reps Edwards, Daschle, Evans and Edgar, the Members of Congress indicated that while the VA *(Ivers)* was litigating against those veterans, VA attorneys argued that the involved courts could not listen to the veteran's defense, arguing that current law [then 38 U.S.C. § 211(a)(1988)] precluded judicial review of any decision of law, regulation, or fact made by the VA -- which statute victimized me for 40 years.

Significantly, the 1988 Wisconsin Law Review at 921, in an article entitled "The Life and Times of the Big Six", took note of the incredible fact that during 1985 alone, the VA filed 58,159 cases against defenseless veterans-- "fully 21.3% of all civil cases in the federal district courts", and also indicated the following at footnote 30:

> "There is some irony that such a major contribution to the federal courts' caseload was made by the VA, an agency that for more than a century has been clothed with a unique immunity from court challenges to its benefit determinations."

This Petitioner asserts that the VA policies which VA General Counsel Ivers enforced, were far more significant than an "irony", and accordingly assert my belief that in the American system of justice, there is something fundamentally "PARTIAL" and/or "biased" about a person such as former VA General Counsel Ivers, who would become involved in a process wherein tens of thousands of defenseless disabled veterans were ultimately sued, while being denied the right to assert a defense --- because of a "GRATUITY" bent of mind.

Therefore, as concerns the "QUESTIONS PRESENTED FOR REVIEW, in light of the above recusal and other law and facts, this Petitioner's demand that CVA Judge Ivers recuse himself was both meritorious and mandated by reason of the fact that Petitioner did reasonably question his IMPARTIALITY based on an extra judicial source i.e. his "bent of mind" which was revealed by his classification of VA service-connected disability compensation, as being "GRATUITOUS". Additionally, because CVA did not meaningfully comply with the literal CAFC mandate to review the single judge decision denying recusal, the Appellate CAFC court erred by permitting CVA to attempt an end run around the mandate of 28 U.S.C. § 455(a), by contriving a "MOOT" theory designed to erroneously negate the vital Recusal issue.

As noted above, the fact that an increasingly desperate VA attempted to deceptively cast the basis of the recusal issue as something other than it was, by asserting the myth that Petitioner's recusal demand was based on "the fact that Judge Ivers was once VA General Counsel **alone**" is dispelled by the language which appears in Petitioner's 1992 Motion for Recusal. Similarly, the VA also attempted to sidestep the prima facie extra judicial "Gratuity" based recusal demand, by erroneously asserting the Petitioner demanded recusal because of former VA

General Counsel Congressionally articulated opposition to judicial review of VA decision."

Once again, the record reveals the true "GRATUITY" mind set recusal basis. The fact that Ivers had been VA General Counsel, in and of it itself, is not the recusal point. Neither is the fact that he testified (in vain) before the Congress in opposition to VA Judicial Review, as such was his right. He however had no right to perceive service-connected disability compensation for war injuries and medical care treating those injuries, as GRATUITOUS. Accordingly, Petitioner believes that the Court of Appeals for the Federal Circuit erred by upholding the VA's above stated deceptive and erroneous basis for Petitioner's RECUSAL demand.

Going to the question of CVA's having held "MOOTNESS" in its November 16, 1994 decision ON REMAND:

> "We conclude that the issue of recusal is now moot and was moot at the time of our earlier decision. Alternatively, and assuming that the Federal Circuit's decision is viable despite mootness, we hold that Judge Ivers was not required to recuse himself." (Aronson v. Brown 7 Vet.App. 153,154 (1994)

the CAFC erred in upholding CVA's mootness theory based on *United States v. Munsingwear, Inc.* 340 U.S. 36,39, 71 S.Ct. 104, 106-07, 95 L.Ed. 36 (1950). As noted above, the Petitioner herein had every legal right as well as a due process of law right, and Recusal statute right (also based on "Due Process of Law") to fully exhaust all of his extraordinary remedies, free from a Judge the IMPARTIALITY of whom Petitioner more than reasonably questioned.

Simply put, the VA wrongfully and in violation of Petitioner's right to Due Process of Law, ignored Petitioner's demand that the entire VA & CVA cases be held in abeyance pending final disposition of the

Recusal issue --- a level judicial playing field obtained --- (which has not transpired yet), and in fact exacerbated the problem by contriving the "mootness theory" as a legal vehicle to attempt to sidestep the clear applicable mandate of the federal RECUSAL statute.

The record before CVA and CAFC is replete as concerns Petitioner's having continuously asserted his belief that the VA "Due Process" regulation, as follows:

> "38 C.F.R. "§ 3.103 *'DUE PROCESS'* - procedural and appellate rights with regard to disability and death benefits and related relief.
>
> (a) *Statement of policy.* Proceedings before the Department of Veterans Affairs are ex parte in nature. It is the ***obligation*** of the Department of Veterans Affairs **to *assist* a claimant in developing the facts pertinent to his or her claim and to render a decision which grants him or her every benefit that can be supported in law *while protecting the interests of the Government*.** This principle . . . apply[s] to all claims for benefits and relief and decisions thereon within the purview of this part." *{emphasis added}*

The resultant competing goals result in a direct conflict. Notwithstanding the VA's above duty to "assist" and "grant" veterans such as me "every benefit that can be supported in law", VA General Counsel Ivers instead chose to "protect the interests ***{budgetary}*** of the government", and Petitioner believes that VA adjudicators continue to be subjected to budgetary pressures, and are financially rewarded (perks) in direct proportion to the extent to which they comply with VA/OMB (Office and Management and Budget) fiscal constraints.

In that regard, when the government recently appealed Gardner v. Brown to the United States

Supreme Court, Justice Souter delivered the opinion of the Court (see: 1994 WL 687055 (U.S.)/Supreme Court case # 93-1128), wherein he, in part, took note of the decades of the VA's being above the law, in part (see: APPENDIX item #7 for complete quote), as follows:

> "[7][8] Finally, we dispose of the Government's argument that the VA's regulatory interpretation of § 1151 deserves judicial deference due to its undisturbed endurance for 60 years. A regulation's age is no antidote to clear inconsistency with a statute, and the fact, again, that § 3.358(c)(3) flies against the plain language of the statutory text, exempts courts from any obligation to defer to it. . . ***As the Court of Appeals for the Federal Circuit aptly stated, "[m]any VA regulations have aged nicely simply because Congress took so long to provide for judicial review***. . . 5 F.3d, at 1463-1464."

Additionally, and highly relevant to the instant Petition and 4 decades of documented VA lawlessness which victimized this Petitioner, the Gardner court noted the following:

> ***The VA's desire to pay less compensation than Congress mandated*** **could not authorize the extra-statutory legislation embodied in 38 C.F.R. § 3.358(c)(3).**

which VA "desire" immersed this Petitioner in a lifelong nightmare, through no fault of my own, and is directly relevant to the Ivers mind-set/IMPARTIALITY which directly caused Petitioner to question his impartiality, and thereby cause his recusal from my case.

When a VA adjudicator is confronted on the one hand with agency budgetary constraints, but on the other hand with the 38 C.F.R. 3.103(a) duty to "render

a decision which grants him or her every benefit that can be supported in law", how do such adjudicators both grant such benefits while at the same time complying with agency budgetary constraints. Petitioner herein asserts that the above VA regulation additional provision that the VA grant such benefits "***WHILE*** PROTECTING THE INTERESTS OF THE GOVERNMENT", sends a tacit message to such adjudicators that the "INTERESTS OF THE GOVERNMENT" i.e. budgetary, transcend the need to grant every benefit that can be supported in law. For that reason, Petitioner herein attaches error to the United States Court of Appeals for the Federal Circuit, by reason of its having ignored this VA Regulation, which on its face appears to be unconstitutionally VAGUE, as well as promulgated by the VA without statutory authority.

Finally, Petitioner has asserted that the United States Court of Appeals for the Federal Circuit, erred by failing to rule on Petitioner's August 29, 1995 extraordinary "MOTION TO SUPPLEMENT THE APPELLATE RECORD", pursuant to Federal Rule of Appellate Procedure 10(e). The additional information which Petitioner sought to have allowed into the record, which went directly to the question of the need for Ivers RECUSAL, was known by both Ivers and the VA at all times material, but was not made known to this Petitioner when before the VA or CVA.

For example, in Petitioner's above cited August 29, 1995 Motion to Supplement the Appellate Record, I an article entitled: "The Case for Judicial Review of Veterans' Administration Benefit Determinations", 2 The Administrative Law Journal 217, 235 footnote 119 (1988), as follows:

> "119. *Id.* at 221 *[see: H.R. 585 and Other Bills Relating to Judicial Review of Veterans Claims: Hearings Before the House Comm. on Veterans Affairs, Vol. II, 99th Cong., 2d Sess. 216-229 (1986)]*

(statement of Donald L Ivers, General Counsel, Veterans' Administration). **Unbelievably, the General Counsel was not ashamed to make the following statement with regard to the affect of a judicial review bill on the way the VA adjudicates claims:**

> [The] VA would be thrust into the unaccustomed adversarial role of developing evidence to refute a claimants contentions in order to assure that the record supports denial of an unmeritorious claim to the satisfaction of a reviewing judge. The Agency would have to document every factor and consideration that led to the denial of a claim, that is, 'build a record.'" *{emphasis added}*

Petitioner asserts that Ivers stated concern that the VA would be "thrust into the ***unaccustomed*** adversarial ***role of developing evidence*** . . . ", additionally provides yet additional (cumulative) firm basis on which Ivers "IMPARTIALITY" may reasonably be questioned. The first 38 years of my VA case, provides dispositive evidence which goes to the VA's historic failure to "develop evidence" and/or "build a record".

Additionally such evidence which also went directly to the question of the need for Ivers IMPARTIALITY and need for recusal, appears in my February 11, 1995 "BRIEF AND APPENDIX ON REMAND", wherein I specifically brought to the attention of the Appellate Court, a 1992 book (relevant portions attached to the Brief)entitled "Forging Legislation" by Paul C. Light, associate dean of the Hubert H. Humphrey Institute of Public Affairs and adjunct professor of political science at the University of Minnesota, and former staff member on Senator John Glenn's Governmental Affairs Committee which helped to usher in one version of the Department of Veterans Affairs Act. Arguable also going to the need for Ivers RECUSAL

and MIND SET, Mr. Light therein makes reference to former VA General Counsel Ivers, as follows at pages 231, 233 and 235:

> "Second, and perhaps even more importantly, gone were most of the players from just six months before . . . ***while the general counsel, who had led the charge against judicial review, was awaiting confirmation as one of the seven judges on the new Court of Veterans Appeals, not necessarily an auspicious sign for the independence of the new court.***
>
> . . . .
>
> Things were progressing even more smoothly at the newly created Court of Veterans Appeals, but perhaps not quite as Congress had intended. If the whole point was an independent court, questions were being raised by the initial appointments. Although the new appointments were all of good character, . . . ***another was the former general counsel of the VA who had fought for years against the very concept of judicial review,*** . . . If the veterans triangle had not captured the court entirely, it did have some very old friends on board."

Additionally, in Petitioner's above cited February 11, 1995 BRIEF AND APPENDIX ON REMAND, I specifically indicated that at page 147 and 148 of a law journal article entitled: "The Case of Brown v. Gardner: The First Test of the Veterans' Judicial Review Act", which appeared in The Federal Circuit Bar Journal, Vol. 4, No. 2, at pages 137-166, Summer 1994, appeared the following concerning Ivers:

> "Indeed, there is even stronger evidence in the legislative history to support the conclusion that Congress did not want the courts to defer to the VA's regulatory interpretations of the statutes it administers. In 1988, the VA General Counsel

{Ivers} had the opportunity to present the Agency's views with respect to various proposed bills that would have provided for judicial review of VA benefit decisions and regulations. In his written submission to Congress, ***the VA General Counsel specifically asked the Congress to give VA's regulations conclusive effect before the courts in any judicial review legislation it passed.*** The General Counsel wrote: "In our view, the [judicial review legislation] should explicitly state that the VA's interpretation of its statutory authority and regulations is to be given conclusive weight unless shown to be arbitrary, capricious, an abuse of discretion, or contrary to law."52 ***This special request suggests that the VA was aware in 1988 that its regulations might not stand close scrutiny by the courts.*** Notwithstanding the VA's plea, no such explicit provision has been enacted by Congress."

52 See Judicial Review Legislation: Hearing Before the Senate Comm. On Veterans' Affairs On S.11, the Proposed Veterans Administration Adjudication Procedure and Judicial Review Act, and S.2292, Veterans' Judicial Review Act, 100th Cong., 2d Sess. 508 (1988)(statement of Donald L. Ivers, General Counsel, Veterans Administration) (emphasis added). Donald L. Ivers is now an associate judge of the United States Court of Veterans Appeals." [emphasis added]

Ivers "SPECIAL REQUEST" to the Congress during 1988 indicates that as VA General Counsel at that point in time, that he knew VA regulations (as in Gardiner), would not stand close scrutiny by the courts. In light of the highly relevant RECUSAL nature of the above additional information which both Ivers and the VA systematically withheld from this Petitioner commencing during 1992, CAFC erred

in failing to grant Petitioner's Motion to Supplement the Appellate Record pursuant to FRAP 10(e).

Also in that regard, Petitioner asserts that it is noteworthy that I included an excerpt in the record below (see: "Appellant's Brief on Remand" dated February 11, 1995 at APPENDIX item #2), from the June 15, 1990 testimony of Veterans Due Process, Inc. (VDP), at the Donald Ivers "Confirmation Hearing", as quoted by VDP from a Stars & Stripes newspaper article which quoted the Congressional Record - Senate, July 11, 1988, page S 9207, wherein Senator Glenn expressed concern regarding the statements of VA General Counsel Ivers, as follows:

> "Other opponents of judicial review tell us that judicial review will change the way the current system works, will interfere with the current "nonadversarial" system. The General Counsel of the VA *[Ivers]* recently *[April 28, 1988]* testified, for example, that judicial review will "require VA to secure additional documentary evidence, time-consuming clinical examinations and field examinations, and in some cases, compel claimants' or other witnesses' attendance at hearings deemed necessary by the agency." Mr. President, I find it hard to believe that forcing the VA to develop a full documentary record is somehow undesirable.
>
> The VA also complains that judicial review would force adjudicators to write more detailed explanations of their decisions, that they would have to tell veterans exactly why decisions were made, that medical files would have to be more carefully screened, and that letters to veterans would have to be more clearly written. Again, it is difficult to understand how that would be bad. Shouldn't every veteran who is denied a benefit be told the specific reasons for that denial? Shouldn't all decisions be based on a careful

> reading of the record? Indeed, shouldn't every decision be based on the best and most appropriate evidence?"

For 40 years, this veteran was victimized with impunity by the VA system concerning the loss of my eye --- the same above described system which Ivers unconscionably defended, premised on a flawed perception of disability compensation concerning the loss of my eye as being a "gratuity".

CONCLUSION

Petitioner bases this Petition on the fact that I have a right to a fair and impartial judge, as well as the APPEARANCE thereof, a right which at its essence is guaranteed by the 5th Amendment "Due Process of Law" clause of the United States Constitution. As in the case of the above referenced Judge who was biased against Americans of German ancestry, I continue to assert that Judge Ivers having classified veterans service-connected disability compensation and medical care concerning disabilities such as the loss of my eye while in the Army, as being GRATUITOUS, as well as for the other reasons as set forth herein, reveals a MIND SET and also that Ivers abused his discretion by failing to comply with the mandate of the federal recusal statute. Additionally, the Court of Appeals for the Federal Circuit erred in both upholding CVA's above described November 16, 1994 decision ON REMAND, in particular by attempting to circumvent the mandate of the RECUSAL statute by erroneously asserting MOOTNESS, as set forth above.

The affirmance by the Court of Appeals for the Federal Circuit in this case, is at odds with the recusal statutory language, the legislative history and traditional notions of fairness, as well as Petitioner's right to Due Process of Law. For all the foregoing reasons, Petitioner respectfully requests the Court to

review the judgment of the Court of Appeals for the Federal Circuit.

DATED this 21st day of March, 1996.

Respectfully submitted,

Samuel A. Aronson

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APPENDIX

APPENDIX

Opinions Below:

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Order on Petition for Rehearing and Suggestion for Rehearing In Banc (United States Court of Appeals for the Federal Circuit, September 26, 1995):

"United States Court of Appeals
for the Federal Circuit

95-7013

SAMUEL A. ARONSON
Claimant-Appellant,
v.
JESSE BROWN, Secretary of Veterans Affairs,
Respondent-Appellee.

O R D E R

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on October 10, 1995, unless another time becomes appropriate under Rule 41.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: September 26, 1995

By _____
Diane M. Frye
Chief Deputy Clerk

cc: SAMUEL A. ARONSON
ROSS D. COOPER

ARONSON V DVA, 95-7013
(CVA - 92-561)

Judgment On Appeal (United States Court of Appeals for the Federal Circuit, August 17, 1995):

"United States Court of Appeals
for the Federal Circuit

95-7013

SAMUEL A. ARONSON
Claimant-Appellant,
v.
JESSE BROWN, Secretary of
Veterans Affairs,
Respondent-Appellee.

Judgment

ON APPEAL from the: United States Court of Veterans Affeals

in CASE NO(S): 92-561

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED. See Fed. Cir. R. 36.

Per Curiam (NEWMAN, PLAGER, and CLEVENGER, Circuit Judges).

ENTERED BY ORDER OF THE COURT

DATED: AUG 17 1995 Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: October 10, 1995

Order On Remand (United States Court of Veterans Appeals, November 16, 1994) --- [7 Vet.App. 153 (1994)]

"United States Court of Veterans Appeals

No. 92-561

SAMUEL A. ARONSON
Appellant,
v.
JESSE BROWN, Secretary of Veterans Affairs,
Appellee.

On Remand from the U.S. Court of Appeals for the Federal Circuit

Nov 16, 1994

As Amended Nov. 18, 1994

Veteran moved to review decision of single judge of Court of Veterans Appeals refusing to recuse himself from case involving claim for veterans' benefits based on his statements referring to veterans' benefits as gratuities when he served as general counsel for VA. The Court of Veterans Appeals, 4 Vet.App. 133, denied motion, and veteran appealed. The Court of Appeals for the Federal Circuit, Newman, Circuit Judge, 14 F.3d 1578, vacated and remanded. On remand, the Court of Veterans Appeals, Nebeker, C.J., held that: (1) controversy regarding recusal was mooted by VA's action satisfying court's order, and (2) assuming controversy was not moot, judge's statement provided no basis for recusal.

Vacated and dismissed.

Steinberg, J., filed concurring opinion.

Samuel A. Aronson, pro se

Mary Lou Keener, Gen. Counsel, Normal G. Cooper, Asst. Gen. Counsel, R. Randall Campbell, Deputy Asst. Gen. Counsel, and Rudrendu Sinhamahapatra, Washington, DC, were on the pleadings, for appellee.

Before NEBEKER, Chief Judge, and MANKIN and STEINBERG, Judges.

NEBEKER, Chief Judge, filed the opinion of the Court. STEINBERG, Judge, filed a separate concurring opinion.

NEBEKER, Chief Judge:

This matter of recusal of a judge of this Court is before us on remand from the United States Court of Appeals for the Federal Circuit ("Federal Curcuit"). This Court had refused to review Judge Ivers' refusal to recuse himself and the Federal Circuit vacated and remanded. *Aronson v. Brown*, 14 F.3d 1578 (Fed.Cir.1994). This Court then issued an order to the Secretary on March 14, 1994, to file a memorandum addressing the status of the underlying claim or claims and whether the issue of recusal in the extraordinary relief matter and that matter itself are moot and, if so, when they became moot. The appellant was told that if he so desired he could file a response to the Secretary's memorandum within thirty days thereafter. The Secretary has filed his memorandum, and the appellant has filed a response. We have reviewed the memorandum and the appellant's response thereto, and, having considered the Federal Circuit's mandate, our decision follows pursuant to

that mandate. We conclude that the issue of recusal is now moot and was moot at the time of our earlier decision. Alternatively, and assuming that the Federal Circuit's decision is viable despite mootness, we hold that Judge Ivers was not required to recuse himself.

This matter began when the appellant appealed the Board of Veterans' Appeals (Board of BVA) decision denying him service connection for a left eye disability. That matter was docketed as No. 90-1346. In an order dated February 13, 1992, Judge Ivers, acting as a single judge pursuant to 38 U.S.C. § 7267, reversed the BVA decision and remanded the matter to (1) amend the 1954 rating decision to award service connection, and (2) "determine the appropriate rating for [the appellant], taking into account the change brought about by the enucleation of ~~his~~ left eye." On April 30, 1992, the appellant filed a petition for a writ of mandamus which raised the following issues: (1) the accuracy of the transcript of a hearing dated January 31, 1989; (2) "[t]he antagonistic reception for Benefits, and/or admit [sic] to V.A. Hospital, for residuals of 4 traumatizing episodes dating from 10 months after induction 1951 to date April 14, 1992"; (3) the fact that a "fee basis card" was not offered to him; (4) a request for VA disability compensation for, inter alia, trauma, anxiety, and loss of earnings plus interest; and (5) VA's failure to give him an eye examination for rating purposes.

Over the next two months, the appellant filed numerous addenda to his petition which, in addition to raising some or all of the concerns in his petition, also variously raised these issues; (1) the

circulation of his records between Seattle and Washington, D.C.; (2) dissatisfaction with VA's slownss; (3) VA's April 1992 finding that his left eye was 30% disabled at induction; (4) his request that VA be held in contempt; (5) his belief that he should be awarded a grant of service connection for post-traumatic stress disorder retroactive to 1953; (6) his request that VA be sanctioned for its failure to comply with the Court's May 1992 order; (7) his request that the Court correct the award of 10% service connection which VA had granted him in April 1992; (8) the appellant's extreme anger and stress which he believed should be recognized as a secondary condition to his left eye condition and therefore compensated and treated by VA; and (9) his request that this Court cause VA to reimburse him for his medical and other expenses as listed by the appellant in his addendum.

On May 19, 1992, Judge Ivers ordered the Secretary to explain why VA had failed to conduct an examination for rating purposes pursuant to the Court's order. The Secretary responded to this order by stating that all the necessary evidentiary development was complete and that a 10% rating decision had been assigned in April. Judge Ivers, on July 7, 1992, issued an order stating that, if the appellant was not given an eye examination, he could appeal the April 1992 rating decision to the Board or seek an increased rating based on his current condition. Also in that order, Judge Ivers denied the appellant's petition for a writ of mandamus and addenda thereto because it did not meet the requirements of the All Writs Act, 28 U.S.C. § 1651.

The appellant then filed a motion for review of the denial of his petition for a writ of mandamus. Shortly after that, he also filed a motion for recusal of Judge Ivers from the panel to consider the motion for review because, the appelant argued, the fact that Judge Ivers was once General Counsel for VA was evidence of a bias. (Pursuant to the Court's internal practice, the single judge was included in the three-judge panel.) Judge Ivers denied the appellant's motion for recusal. The appellant filed a timely motion to review Judge Ivers' refusal to recuse himself. On July 30, 1992, this matter was assigned to a panel consisting of Judges Mankin, Ivers, and Steinberg. On September 2, 1992, that panel issued an order denying both the appellant's motion to review the denial of the writ of mandamus and the motion to review Judge Ivers' decision not to recuse himself. By order dated October 23, 1992, the Court substituted Chief Judge Nebeker for Judge Ivers for purposes of the recusal issue only. The present panel issued an opinion on January 25, 1993, holding that this Court had no authority to review an individual judge's refusal to recuse himself. *Aronson v. Brown*, 4 Vet.App. 133 (1993). The appellant appealed that decision to the Federal Circuit, which vacated our dismissal of Mr. Aronson's motion for review, and remanded. *Aronson*, 14 F.3d at 1583.

In August and September 1992, and unknown to this Court and the Federal Circuit, VA complied with Judge Ivers' order of July 7, 1992, by giving the appellant two eye examinations. In October 1992, based on those eye examinations, the VA regional office (RO) awarded a rating of 10% and informed the appellant that he had 60 days

in which to appeal this rating decision. (The VARO subsequently extended that time period in view of the issues still pending in this Court.) At this point, on October 9, 1992, the appellant's appeal before this Court became moot since VA had met all the directives of the February 13, 1992, remand. Thus, it appears that, had this Court or the Federal Circuit been advised that VA had awarded service connection and assigned a 10% rating for enucleation of the appellant's left eye, mootness of the controversy would have been recognized because the order of this Court had been fully satisfied and there remained nothing further for Judge Ivers or a panel of this Court to act on within the jurisdiction of this Court. Of course, Mr. Aronson can appeal the 10% rating decision to the Board as a separate matter, and we are advised he has done so.

[1] As to Courts created under Article III of the Constitution, once a case on appeal is moot, the Court is divested of jurisdiction because there is no longer a case or controversy. "Article III requires that a plaintiff's claim be live not just when he first brings the suit but throughout the entire litigation, and once the controversy ceases to exist the Court must dismiss the case for lack of jurisdiction." *Lusardi v. Xerox Corp.*, 975 F.2d 964, 974 (3rd Cir.1992) (citations omitted).

[2] Under Article III, a Court has an independent duty to examine its own jurisdiction. *Aguirre v. S.S. Sohio Intrepid*, 801 F.2d 1185, 1189 (9th Cir.1986) ("Because mootness is an element of justiciability and raises a question as to our jurisdiction, we consider the matter *sua sponte*." (citations omitted));

Wahl v. McIver, 773 F.2d 1169, 1173 (11th Cir.1985) (court under a duty to review its jurisdiction over an appeal at any point in the appellate process); *see also In re I.B. v. District of Columbia Dep't of Human Resources, Social Services Admin.* 287 A.2d 827 (D.C. 1972) (appeal in an Article I Court, the District of Columbia Court of Appeals, from denial of habeas corpus was moot where jurisdiction over appellant had terminated). This Court has adopted the case or controversy jurisdictional restraints imposed by Article III. *Mokal v. Derwinski*, 1 Vet.App. 12, 13 (1990).

[3] Once the Court determines that the underlying appeal, here the appellant's claim for service connection for the enucleation of his left eye, is moot, his request for extraordinary relief and his motion for recusal in that separate proceeding are similarly moot. There is, as the All Writs Act states, no jurisdiction which the Court can act "in aid of." 28 U.S.C. 1651. The First Circuit employed this logic in *Pontarelli v. Stone*, 978 F.2d 773 (1st Cir.1992). In *Pontarelli*, the parties settled their dispute while the appeal to the First Circuit was pending. The only remaining "issue" was the claim that the district judge should have recused himself. The First Circuit held that:

> [B]efore an appellate court can make a ruling on the appropriateness of disqualification by a district judge, the issue must be raised as soon as the cause is known, a factual record must be made, a ruling adverse to appellant must be made on that record, the matter must be properly appealed, *and the underlying dispute* as to which

> the district court ruling is relevent *must still remain a live controversy* when the issue comes for resolution by the court of appeals.

Id. at 775 (emphasis added). Because the underlying dispute had been completely mooted in *Pontarelli*, there was no relief available regarding the motion for recusal that could be granted--a new trial is the remedy for a violation of 28 U.S.C. 455, the statute dealing with recusal, *id.*--and the issue of recusal was thus moot. Id. Similarly, in the instant case, there is no matter before this Court on which a new appellate decision could be based, and so there would be no remedy which this Court could afford to the appellant even if we were to hold that Judge Ivers should have recused himself.

[4] We hold that the controversy regarding recusal was moot in October 1992, before our January 25, 1993, decision (and perforce before the Federal Circuit's decision) was rendered. Because the Federal Circuit has already vacated our opinion of January 25, 1993 (albeit on the grounds), we must, in addition, vacate Judge Ivers' August 14, 1992, order denying recusal and the July 7, 1992, order denying mandamus relief and dismiss the motion for recusal and request for mandamus. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106-07, 95 L.Ed. 36 (1950); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ____U.S.____, 115 S.Ct. 386, 130 L.Ed,2d 233 (1994) (where the controversy is mooted by voluntary settlement, vacatur of a judgment under review is not justified except under exceptional circumstances). With regard to any quarrel the appellant may have with

the 10% rating, the appellant would have to exhaust his administrative remedies before seeking relief from this Court. *Quigley v. Derwinski*, 1 Vet.App. 1 (1989).

Recognizing that we have a mandate from the Federal Circuit issued without knowledge of the jurisdictional facts regarding mootness, and further recognizing that the Federal Circuit, being unadvised by the parties as to those facts, has had no opportunity to consider action dictated by *Munsingwear*, we proceed, in the alternative, to literal compliance with that mandate. Should the appellant appeal this decision, the Federal Circuit may wish to consider the vitality of its remand decision as precedent.

The appellant argues that Judge Ivers had arbitrarily and capriciously ignored prima facie evidence regarding the condition of the appellant's left eye while in the service and that his statement that "veterans have a special advantage over claimants for other types of gratuitous benefits" made while he was General Counsel of VA before the U.S. Senate Committee on Veterans' Affairs was evidence of partiality. On November 2, 1992, the appellant also requested that, when this Court conducted a reconsideration of the recusal issue, we include in our consideration the entire contents of his petition for a writ of mandamus which he had filed with the Federal Circuit. Pursuant to his request, we have examined the arguments the appellant put forth in that forum, as well as the voluminous appendices he attached thereto.

The statute pertaining to disqualification of judges, 28 U.S.C. § 455, provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> > . . . .
> >
> > (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
> > . . . .
> >
> > (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> > . . . .
> >
> > (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding . . . .

(Section 455 is applicable to the Court of Veterans Appeals by operation of 38 U.S.C. § 7264(c).)

[5] The appellant basically argues that Judge Ivers should have recused himself under the provisions of 28 U.S.C. § 455(a) because the fact that Judge Ivers was once VA General Counsel alone suggests that his impartiality may reasonably be questioned. Appellant's brief (Br.) for Federal Circuit at 15. The appellant also asserts that Judge Ivers has an "interest" in not recusing himself in this case because it might lead to disqualification in all cases and that that "interest" required him to recuse himself under section 455(b)(5)(iii). *Id.* We note first of all that the issues of then-General Counsel Ivers' opposition to judicial review of VA decisions as a matter of policy, his recusal in appropriate cases, and whether or not opinions issued by then-General Counsel Ivers were his own or reflections of sound legal precedent were raised and fully explored during Judge Ivers' confirmation hearings. *See: Nomination of Donald L. Ivers: Hearing Before the Comm. on Veterans' Affairs, United States Senate*, 101st Cong., 2nd Sess. 21, 24, 26, 30, 32, 94-99 (1990) [hereinafter Hearings] (statements of Donald L. Ivers and letter from Senator Cranston, Chairman, to Donald Ivers and response thereto). Thereafter, his nomination was recommended unanimously for confirmation by the Senate Committee on Veterans' Affairs, and he was confirmed without opposition by the United States Senate. *See* 136 Cong.Rec. S12339 (1990).

[6] To determine whether section 455(a) has been violated, the vast majority of courts have adopted an objective standard. 13A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3549 (1984). "'[A] judge

should recuse himself where a reasonable man knowing all the circumstances would harbor doubts concerning the judge's impartiality.'" *Edelstein v. Wilentz*, 812 F.2d 128, 131 (3rd Cir.1987) (citation omitted). Here, under such a reasonable person standard, there is absolutely no indication that Judge Ivers' impartiality could be reasonably questioned. Courts have consistently ruled that statements regarding law by a government agent do not provide a basis for recusal where the agent subsequently serves as judge in a case involving the same matters of general policy. For example, a movant seeking to recuse a district court judge argued that the judge's prior service on the Attorney General's Commission on Pornography created the appearance of partiality under 28 U.S.C. § 455(a). *United States v. Payne*, 944 F.2d 1458, 1476 (9th Cir.1991). The Ninth Circuit found the connection between the judge's service on the Commission and the issue in the case, defendant's conviction on four counts of carnal knowledge of a female under age 16, to be too attenuated to mandate recusal. *Id.* The Court of Appeals stated:

> Courts have rejected the notion that such generalized policy views necessitate recusal as a matter of course. Courts have likewise held that expertise on and exposure to a subject . . . does not necessitate recusal. *See Laird v. Tatum*, 409 U.S. 824, 835, [93 S.Ct. 7, 13-14, 34 L.Ed.2d 50] . . . (1972) (mem. op. by Rehnquist, J.) ("Proof that a Justice's mind was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.")

Id. (other citations omitted). As then-Justice Rehnquist stated in the memorandum opinion cited by the Ninth Circuit, "[I]t would be unusual if those coming from policy making divisions in the Executive Branch . . . had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law." *Laird*, 409 U.S. at 835, 93 S.Ct. at 14. *See also United States v. Glick*, 946 F.2d 335, 336 (4th Cir.1991) (judge who is presently serving as Chairman of the United States Sentencing Commission need not recuse himself from an appeal of defendant's sentence).

Although the appellant in this case relies almost solely on subsection (a) of section 455, we also examine whether Judge Ivers' refusal to recuse himself violated subsection (b)(1) regarding a personal bias concerning a party and/or subsection (b)(3) concerning participation in the particular case while employed by the government. The strictures of subsection (b) are less broad than that found in subsection (a). See *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859 n. 8, 108 S.Ct. 2194, 2202 n. 8, 100 L.Ed.2d 855 (1988). Under subsection (b)(1), if there is a showing of personal bias or prejudice, recusal is required. *See Tafero v. Wainwright*, 796 F.2d 1314, 1322 (11th Cir.1986). However, such bias must indeed be personal. *Id.* (mere fact that the judge was once a highway patrolman did not mandate recusal or constitute a disqualification even where he had attended the funeral of the patrolman whom defendant had killed). There is no indication in the record that the statements Judge Ivers made regarding veterans' benefits being gratuities were other than an accurate statement of the

official VA position at that time. Indeed, Judge Ivers told the Senate Committee at his confirmation hearings that his personal opposition was only to judicial review of BVA decisions "in the overcrowded [Article III] Federal court system," not in the new Court of Veterans Appeals. Hearings at 21; *see also* Hearings at 24, 26. He stressed that his testimony to Congress had been presented "as an advocate . . . [representing] the position of the Administration." Hearings at 24. Moreover, Judge Ivers' testimony regarding veterans' benefits as "gratuities" was specifically brought to the attention of the Senate Committee by a witness during the confirmation hearing, Hearings at 66, and his nomination was thereafter unanimously approved by the Committee and confirmed by the Senate. *See* 136 Cong.Rec. S12339 (1990).

With regard to the provisions of subsection (b)(3), although we find no cases in which a motion to recuse was submitted based on a judge's previous role as general counsel of a federal executive agency, courts, when presented with cases under section 455(b)(3), have held that recusal is not mandated where the judge was previously an assistant U.S. attorney unless that judge had personal knowledge of the particular case at issue. For example, merely having been at the U.S. Attorney's office, even in a supervisory position, is insufficient ground for recusal under the statute. *See, e.g., Kendrick v. Carlson*, 995 F2d. 1440, 1444 (8th Cir.1993); *United States v. Di Pasquale*, 864 F.2d 271, 279 (3rd Cir.1988); *United States v. Gipson*, 835 F.2d 1323, 1326 (10th Cir.1988); *see* also GUIDE TO JUDICIARY POLICIES AND PROCEDURES, vol. 2, Ch. 5, 1 Compendium

3.4-4 (1993) (under Canon 3 of the Code of Conduct for U.S. Judges, which closely mimics the wording of § 455, "A judge who formerly served as Assistant United States Attorney should recuse from all cases involving matters with which the judge came in contact during the judge's tenure, or for which the judge bore some responsibility, but need not recuse from cases in which the judge did not participate."). A district judge similarly refused to recuse himself from a habeas corpus case even though at the time the prisoner was appealing a conviction in the state of Wisconsin, the judge was attorney general of Wisconsin and the State was represented as respondent by the attorney general. *Muench v. Israel*, 524 F.Supp. 1115, 1116 (E.D. Wis.1981). As the Tenth Circuit made clear in *Gipson*, 835 F.2d at 1326, the current version of § 455(b)(3), by its language, requires actual participation on the case currently being decided. Congress' use of the word "participated" in the current version of the statute ("and in such capacity participated as counsel") implies that a higher degree of activity on the case is required than in the previous version of the statute which referred to any case on which the judge had been "of counsel." *Id.* The Tenth Circuit stated in *Gipson*:

> Thus, simple logic dictates the conclusion that in reordering the language of the statute upon which recusal is based and distinguishing between situations in which recusal is mandated, Congress has implicitly drawn a line.
>
> In our opinion, before the presumption arises that a judge is in fact partial because of his past

> conduct as an attorney, a party seeking disqualification must show that the judge actually participated as counsel. Mandatory disqualification then is restricted to those cases in which a judge had previously taken a part, albeit small, in the investigation, preparation, or prosecution of a case.

Id.

The appellant does not contend that Judge Ivers participated in his case while at VA, but rather argues that the fact that Judge Ivers was once VA's General Counsel is conclusive of a partiality to VA. *See* Appellant's reply Br. for Federal Circuit at 7-8. Thus, the appellant, although he attempts to, makesno allegation that would constitute the basis for disqualification under subsection (b)(3), nor would the record support any such allegation. It is indeed curious that the appellant sought Judge Ivers' recusal when he had prevailed against VA on the issue presented--service connection.

Finally, with regard to § 455(b)(5)(iii), i.e., recusal is mandated where the judge or his relative has an interest that may be substantially affected by the outcome, the appellant merely argues that "one such subsstantial 'interest' concerning Judge Ivers[] is his knowledge that[,] based on the outcome of my recusal action, . . . he might possibly be required to recuse himself from every veterans case which comes before him. . . ." Appellant's Br. for Federal Circuit at 14-15. We find the motive that the appellant attributes to Judge Ivers to be fair too attenuated and speculative to qualify as an "interest" within the meaning of § 455(b)(5)(iii).

Cf. In re Virginia Elec. & Power Co., 539 F.2d 357, 368 (4th Cir.1976) (Fourth Circuit adopted Professor Wright's suggestion that whether any interest other than a financial one is disqualifying may "'depend on the interaction of two variables: the remoteness of the interest and its extent or degree.'")

Given that there is no indication in the record that any statements made by Judge Ivers regarding VA benefits were other than mere reflections of VA's policy at that time or that Judge Ivers had contact with the appellant's claim except in his judicial capacity, there can be no reasonable basis on which his "impartiality might reasonably be questioned," and there has been no showing of a "personal bias or prejudice," or that he "participated" in or "expressed an opinion" concerning the merits of this particualr case. 28 U.S.C. § 455(a), (b)(1), (3). Thus, we hold alternatively that there were no grounds under which Judge Ivers should have recused himself.

Accordingly, Judge Ivers' order denying recusal is VACATED, and the motion to recuse and the request for extraordinary relief are DISMISSED as moot. *See Munsingwear*, 340 U.S. at 39, 71 S.Ct. at 106-07.

STEINBERG, Judge, concurring:

I concur in the judgment of the Court. I do not join in the Court's opinion for two reasons. First, I do not think it this Court's proper function to make suggestions to the Federal Circuit about what issues it might wish to consider.

Second, I believe that this Court should do no more than apply, as it does, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106-07, 95 L.Ed. 36 (1950), and should not speculate on the recusal issues which, we all agree, have been rendered moot. See *Pontarelli v. Stone*, 978 F.2d 773, 776 (1st Cir.1992). Having wisely decided at its very inception to adopt "the jurisdictional restrictions of the Article III case or controversy rubric", *Mokal v. Derwinski*, 1 Vet. App. 12, 15 (1990), this Court should adhere to those constraints.

I am mindful that we have a mandate from the Federal Circuit to review the single-judge decision denying recusal. However, as the majority notes also, *ante* at 156, that mandate was issued without the Federal Circuit's knowledge of the jurisdictional facts regarding mootness, and the Circuit has had no opportunity to consider action dictated by *Munsingwear, supra*. It is true that this Court's task on remand, pursuant to the law-of-the-case doctrine, is to follow the findings, holdings, and instructions contained in the appellate court's mandate. However, literal compliance with the appellate court's mandate is not required where there is "an extremely good reason to do otherwise." *Vieux Carre Property Owners, Residents and Associates, Inc. v. Brown*, 948 F.2d 1436, 1442 (5th Cir.1991) (*Vieux Carre*). The Federal Circuit has held that the law-of-the-case doctrine does not bar a lower court from considering the question of mootness, where, as here, the appellate court did not rule on that issue and it was raised for the first time on remand. *Exxon Corp. v. U.S.*, 931 F.2d 874, 877 (Fed.Cir.1991) (law-of-the-case doctrine applies only to issues actually

determined by appellate court); *see also Vieux Carre*, 948 F.2d at 1442-43. Indeed, a court has a "duty to consider on remand whether mootness has deprived it of jurisdiction to consider the suit." *Vieux Carre*, 948 F.2d at 1443.

Under these circumstances, literal compliance with the Circuit's mandate has led the Court to issue an opinion regarding 28 U.S.C. § 455 that is "advisory in nature". *Pontarelli*, 978 F.2d at 776. I believe that such action is an unsound and unwarranted departure from our precedents and self-imposed judicial constraint.

Order recognizing and reversing 38 years of "Clear and Unmistakable Error" on the part of the Veterans Administration, retroactive to March 23, 1954 (United States Court of Veterans Appeals, February 13, 1992):

"United States Court of Veterans Appeals

No. 90-1346

SAMUEL A. ARONSON
Appellant,
v.
Edward J. Derwinski, Secretary of
U.S. Department of Veterans Affairs,
Appellee.

Before IVERS, *Associate Judge*

O R D E R

This matter is before the Court on the Secretary of Veterans Affairs' (Secretary) motion to remand the appeal to the Board of Veterans' Appeals (BVA) and to stay further proceedings.

This appeal is from a September 7, 1990, BVA decision which concluded that a March 23, 1954, rating decision denying service connection for enucleation of appellant's left eye was final and did not involve clear and unmistakable error. Appellant's brief was filed on November 12, 1991. Along with his brief, appellant filed a motion for oral argument. On December 12, 1991, the Secretary moved for a remand and a stay of further proceedings. Appellant's opposition to a remand was filed on December 30, 1991.

The record on appeal, which was filed on October 15, 1991, reflects that appellant

was in the Army from January 19, 1951, to April 13, 1953. His preinduction examination listed appellant's vision in his right eye as 20/20 but having only light perception in the left eye. He was qualified for service with an "E-3" physical profile, "[l]eft eye, traumatic blindness." R. at 3-4. Appellant had this eye condition since 1943. R. at 43.

After being in the Army for several months, appellant began experiencing sharp pain in his left eye. R. at 6. Appellant sought treatment for his pain and continued to do so for the remainder of his basic training but received little alleviation of the pain. After basic training, appellant was stationed in Germany. There, appellant underwent enucleation of his left eye at a service hospital. R. at 22,27. An initial claim for service connection for enucleation of his left eye was denied in a March 23, 1954, rating decision. R. at 47.

In March 1987, appellant sought to reopen his claim asserting that the March 23, 1954, rating decision contained clear and unmistakable error. A deferred or confirmed rating decision, dated November 28, 1988, continued to deny service connection and denied that there was any clear and unmistakable error in the prior rating decision. R. at 68. Appellant then had two subsequent hearings before his claim was denied by the BVA.

The Secretary takes the view that a remand is "in order" for the BVA to readjudicate appellant's claim, in order to:

> specifically [address] whether [appellant's] disability increased in

> severity during service, and (if so), whether the presumption of aggravation is rebutted by 'clear and unmistakable evidence,' as required by 38 U.S.C. § 1153 [formerly § 353] and 38 C.F.R. § 3.306(b), and as required by the Court's decision in *Akins v. Derwinski*, [1 Vet.App. 228 (1991). In its decision, the Board should explain its reasons or bases for its findings with regard to those issues, in accordance with *Gilbert [v. Derwinski*, 1 Vet.App. 49, 56-57]. Additionally, the Board should support any medical conclusions it reaches with a medical basis, in accordance with *Colvin [v. Derwinski*, 1 Vet.App. 171, 174-175 (1991)]. Finally, the Board should address the applicability of the 'benefit of the doubt' standard, and its reasons or bases underlying its consideration of the doctrine, as required by 38 U.S.C. § 5107(b) (formerly § 3007(b)), and the Court's decision in *Gilbert*, [at 53-56].

Secretary's Motion at 3-4. Appellant opposed the remand on the ground that, under Akins, he was entitled to a reversal.

The major problem with the BVA decision is not the failure to discount the evidence in support of appellant's claim but the failure to recognize that there is no evidence of record against the claim. It is true that "this Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a 'plausible' basis in the record for the factual determinations of the BVA...we cannot overturn them." *Gilbert*, at 53.

However, it is also true that where there is no plausible basis in the record for the factual determination of the BVA, we can and must overturn them. See *Willis v. Derwinski*, 1 Vet.App. 66, 70 (1991).
{**emphasis added**}

Here, the presumption of aggravation of a preservice disability attached and the government did not offer clear and unmistakable evidence to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service. Nor did it point to a specific finding that the increase in disability was due to the natural progression of the disease, which is required under 38 C.F.R. § 3.306(b). See also *Akins*, at 232-233.

Instead of a confession of error, the Secretary seeks only remand. See U.S. Vet. App. R. 5,28(b)(2). For the reasons stated by the Secretary in support of the motion for remand, the motion will be denied because, on this record, a reversal, not a remand, appears required. *See, e.g., Crandell v. Derwinski*, _ Vet.App._, No. 90-1046 (U.S. Vet. App. Jan. 31, 1992). {**emphasis added**}

On consideration of the foregoing, it is

ORDERED that appellant's motion for oral argument is denied; it is further

ORDERED that the Secretary's motion for a remand and for a stay is denied; it is further

ORDERED that the September 7, 1990, BVA decision is reversed and the matter is

remanded to amend the 1954 rating decision to award service connection and determine the appropriate disability rating for appellant, taking into account the change brought about by the enucleation of his left eye. **In accordance with 38 C.F.R. § 3.105(a), "for the purpose of authorizing benefits," the corrected rating decision must be given the same effect as if rendered March 23, 1954.** **(emphasis added)**

DATED: FEB 13 1992

BY THE COURT

DONALD L. IVERS
Associate Judge

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Excerpt from: "Brief and Appendix ON REMAND from CAFC, dated February 11, 1995

"During this period of time, May - June, 1992, several significant events transpired which directly gave rise to this Petition, as noted in the following excerpt from veteran's February 11, 1995 Brief and Appendix ON REMAND from the United States Court of Appeals for the Federal Circuit:

"At approximately that point in time, May 1992, 2 profoundly significant events transpired, which I assert to be absolutely relevant to this recusal appeal, as follows:

1. I learned that Court of Veterans Appeals Judge Ivers who was actively involved in my CVA case, had formerly been the General Counsel of the Veterans Administration, which in and of itself I did not perceive as being significant. However, I also learned that as VA General Counsel, Ivers had appeared before a United States Senate Committee [during 1988] concerning the issue of subjecting the VA to Judicial Review, and specifically termed veterans benefits (such as my service-connected disability for the loss of my eye) as being "GRATUITOUS BENEFITS, a revelation which reasonably caused me to question his impartiality when judging any matter concerning veteran's benefits."

Accordingly, it is a matter of record that in my:

"MOTION FOR REVIEW BY A PANEL OF THE COURT, OR BY THE FULL COURT, PURSUANT TO U.S. COURT OF VETERANS APPEALS RULE 35(b); AND MOTION THAT ASSOCIATE JUDGE DONALD L.

IVERS BE RECUSED (DISQUALIFIED)
FROM HEARING THIS CAUSE, PURSUANT
TO 28 U.S.C. § 455"

dated July 21, 1992, that I asserted the following:

RECUSAL:

This pro-se veteran is very troubled by, and can envision no good reason why an independent and objective Associate Judge Ivers ignored my dispositive "PRIMA FACIE EVIDENCE", as well as my demand that the Secretary apply 38 C.F.R. § 4.22 in its entirety, not merely those portions of said regulation which serve the Secretary's budgetary driven goals. This veteran again asserts that such behavior on the part of the Secretary is arbitrary and capricious, and when ratified by Judge Ivers is no less arbitrary and capricious.

In that regard, it recently came to my attention that Associate Judge Donald L. Ivers was the General Counsel of the United States Veterans Administration, prior to being appointed and confirmed on to this Court. I am now aware that on April 28, 1988, that then VA General Counsel Ivers appeared before the United States Senate Committee on Veterans' Affairs, and in his prepared written statement (excerpt attached) said the following:

> **"Generally speaking, veterans have a special advantage over claimants for other types of *GRATUITOUS* benefits."**
>
> *(emphasis added)*

[see: Senate Hearing book: 100-938, April 28, 1988, concerning VA Judicial Review Legislation, at page 493]

It is clear to this veteran, that former General Counsel Ivers having classified veterans benefits as being **"gratuitous"** --- **GIFTS** --- continues to be his perception, is a **BIAS** on his part, is **prejudicial** to my case and, at least in part, explains his arbitrary and capricious July 7, 1992 order. Neither Title 38 United States Code nor the United States Congress, share/shared Judge Ivers classification of veterans benefits as being "gratuitous". I assert that the disability compensation benefits which compensate me for the loss of my eye as a direct result of my honorable military service, are **NOT** "gratuitous".

Accordingly, I formally and strenuously object to now Associate Judge Ivers continuing to be involved in my case before the Court of Veterans Appeals, in any manner -- to include the requested panel or en banc de novo review. Accordingly, I hereby demand that this Court recuse Judge Ivers from any additional involvement in my case, or, in the alternative, that Judge Ivers recuse himself for the reasons cited herein. Relevant to my RECUSAL demand, it is my understand that Associate Judge Ivers recently recused himself from the case of veteran Arthur N. Bernklau #90-0637, because of the same **prejudicial** factor.

Veterans Administration Regulation 38 C.F.R. § 4.22: Rating of disabilities aggravated by active service:

"§ 4.22 Rating of disabilities aggravated by active service.

In cases involving aggravation by active service, the rating will reflect the degree of disability over and above the degree existing at the time of entrance into the active service, whether the particular condition was noted at the time of entrance into the active service, or it is determined upon the evidence of record to have existed at that time. It is necessary therefore, in all cases of this character to deduct from the present degree of disability the degree, ***if ascertainable, of the disability existing at the time of entrance into active service, in terms of the rating schedule***, except that if the disability is total (100%) no deduction will be made. The resulting difference will be recorded on the rating sheet. ***If the degree of disability at the time of entrance into the service is not ascertainable in terms of the schedule, no deduction will be made.***"

[emphasis added]

Excerpt from Gardner v. Brown, 1994 WL 687055 (U.S.)/Supreme Court case # 93-1128:

In that regard, when the government appealed Gardner v. Brown to the United States Supreme Court, Justice Souter delivered the opinion of the Court wherein he, in part, took note of the decades of the VA's being above the law, as follows:

"[7][8] Finally, we dispose of the Government's argument that the VA's regulatory interpretation of § 1151 deserves judicial deference due to its undisturbed endurance for 60 years. A regulation's age is no antidote to clear inconsistency with a statute, and the fact, again, that § 3.358(c)(3) flies against the plain language of the statutory text, exempts courts from any obligation to defer to it. . . But even if this were a close case, where consistent application and age can enhance the force of administrative interpretation, . . . the Government's position would suffer from the further factual embarrassment that Congress established no judicial review for VA decisions until 1988, only then removing the VA from what one congressional Report spoke of as the agency's "splendid isolation." H.R.Rep. No.100-963, pt. 1, p.10 (1988). ***As the Court of Appeals for the Federal Circuit aptly stated, "[m]any VA regulations have aged nicely simply because Congress took so long to provide for judicial review***. The length of such regulations' unscrutinized and unscrutinizable existence" could not alone, therefore, enhance any claim to deference. 5 F.3d, at 1463-1464."